

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

FRANK SILVA ROQUE,  
*Petitioner.*

No. 2 CA-CR 2016-0224-PR  
Filed July 29, 2016

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
NOT FOR PUBLICATION  
*See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.*

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Petition for Review from the Superior Court in Maricopa County  
No. CR2001095385  
The Honorable Mark F. Aceto, Judge

**REVIEW GRANTED; RELIEF DENIED**

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Frank S. Roque, Buckeye  
*In Propria Persona*

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**MEMORANDUM DECISION**

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

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ECKERSTROM, Chief Judge:

¶1 Frank Roque petitions for review of the trial court’s summary dismissal of his successive, untimely notice of post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review, but we deny relief.

¶2 After a jury trial, Roque was convicted of first-degree murder, attempted first-degree murder, endangerment, and three counts of drive-by shooting, all committed in September 2001. He was sentenced to death for the murder; the trial court imposed a combination of concurrent and consecutive prison terms for the other offenses. After independent review, our supreme court reduced Roque’s death sentence to natural life imprisonment. *State v. Roque*, 213 Ariz. 193, ¶ 171, 141 P.3d 368, 406 (2006). Roque previously has sought post-conviction relief, on numerous occasions, without success.

¶3 In August 2014, Roque filed a notice of post-conviction relief in which he alleged ineffective assistance of trial counsel and the existence of “newly discovered material facts,” regarding prosecutorial misconduct and trial court error, “which probably would have changed the verdict or sentence.” *See* Ariz. R. Crim. P. 32.1(e). Specifically, he alleged, as a newly discovered fact, that our supreme court’s decision on direct appeal was “flawed,” based on what he maintained was a factual error regarding the record.

¶4 The trial court summarily dismissed the notice, concluding Roque’s claims were “more appropriately analyzed as alleging his conviction and sentence were obtained in violation of his constitutional rights” pursuant to Rule 32.1(a), and such a claim

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cannot be raised in an untimely or successive proceeding. *See* Ariz. R. Crim. P. 32.4(a). This petition for review followed.

¶5 On review, Roque maintains the trial court’s “summary rejection of [his] Rule 32 notice lacks merit and should be rejected.” He argues he was entitled to relief pursuant to Rule 32.1(e) “because the facts are ‘new’ that the Arizona Supreme Court in it[s] review of this case overlooked” certain facts in the record that he believes would have been relevant to his appeal.

¶6 We review a summary denial of post-conviction relief for an abuse of discretion, *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006), and we find none here. The trial court correctly concluded that Rule 32.1(e) does not encompass an allegation that facts found in the record were omitted from the supreme court’s decision on direct appeal. Such facts, whether or not they were included as relevant to our supreme court’s analysis, were known at the time of trial, and so cannot be considered “newly discovered.” *See State v. Bilke*, 162 Ariz. 51, 52, 781 P.2d 28, 29 (1989) (for purpose of Rule 32.1(e), newly discovered evidence “must appear on its face” to have existed at time of trial but to have been discovered after trial).

¶7 Moreover, dismissal of Roque’s notice was also proper pursuant to Rule 32.2(b), which provides that, when a non-precluded claim is raised in a successive or untimely post-conviction relief proceeding, “the notice of post-conviction relief must set forth the substance of the specific exception [to preclusion] and the reasons for not raising the claim in the previous petition or in a timely manner.” Ariz. R. Crim. P. 32.2(b). “If the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner, the notice shall be summarily dismissed.” *Id.* According to the trial court’s order, this is Roque’s twelfth Rule 32 proceeding, and he initiated it eight years after our supreme court’s decision on direct appeal. *See Roque*, 213 Ariz. 193, 141 P.3d 368. Nothing in his notice suggested any meritorious reason for his delay in asserting this claim.

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¶8 The trial court did not abuse its discretion in dismissing Roque's untimely, successive notice of post-conviction relief. Accordingly, although we grant review, we deny relief.